

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 62209-9-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
BISRAT TEKESTE HAILE,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: August 3, 2009
_____)	

AGID, J.—Bisrat Haile appeals his conviction for one count of felony violation of a no-contact order. He contends that the trial court erred by denying a mistrial when a witness testified to evidence of other incidents in violation of the court’s ruling in limine. Because the comments were ambiguous and this witness’s testimony was only relevant to the charges of which Haile was acquitted, he fails to show that the witness’s comments were a serious trial irregularity that prejudiced the outcome of the trial. Accordingly, we affirm.

FACTS

Haile was involved in a relationship with Frewoini Tesfatsion for approximately five years. They had a daughter together and lived together for a time, but Haile

eventually moved out of Tesfatsion's apartment. In April 2006, the Seattle Municipal Court entered three orders prohibiting Haile from contacting Tesfatsion. The orders expired in April 9, 2008.

On January 9, 2008, Tesfatsion called the police and reported that Haile contacted her. According to Tesfatsion, the day before, on January 8, she returned home from work and found flowers and a card at the door to her apartment. She said she recognized the handwriting on the card as Haile's and threw the flowers away. She then called Haile and told him she was not interested in his apology but did not immediately report the incident to the police. She said Haile continued to call her throughout the night and she eventually stopped answering the phone.

Tesfatsion also reported that the next morning she awoke to noise outside and saw Haile standing outside her living room window, calling out to her to consider reconciliation. She said she asked him to leave, but he refused. She said she then pretended to call the police, but did not actually do so until later, after she took her children to school and returned home alone. She also told police that during one of the phone calls, he threatened to hurt her mother and that when he was yelling at her outside the window, he told her that she was "a dead woman" if he could not have her.

Tesfatsion then told police that Haile might be at his brother's house and provided that address. Police later found him at that address, arrested him, and booked him into the King County Jail. While at the jail, Haile called Tesfatsion at her home.

Police determined that Haile had two prior misdemeanor convictions for violation

of a no-contact order and one felony conviction for violation of a no-contact order, all involving Tesfatsion. The State then charged Haile with four counts of felony violation of a no-contact order and one count of felony harassment. Haile pled not guilty and proceeded to trial.

The State moved in limine to admit evidence of Haile's prior convictions and other incidents involving Tesfatsion.¹ The State sought to use the prior convictions to prove the felony element of the current no-contact order violations and the evidence of the other incidents as proof of the reasonable fear element of the harassment charge.² The court ruled that evidence of the two prior misdemeanor convictions for no-contact order violations was admissible on the current no-contact order violation charges, but that evidence of the other convictions used to prove the harassment charge could come in only as prior acts, not convictions. The court then limited the admissible prior acts to four incidents: those occurring on January 26, 2006; February 25, 2006; and January 12, 2007, and another incident listed in the State's brief that was not otherwise identified.³

At trial, Tesfatsion testified to the charged incidents. The State also played a tape recording of Haile's telephone conversation with her from the jail. But Tesfatsion did not testify that Haile ever threatened her during these incidents.

The prosecutor also questioned Tesfatsion about other prior incidents involving

¹ While not altogether clear from the pretrial record, it appears that the State sought to introduce evidence of other prior convictions involving Tesfatsion. The State apparently submitted briefing below that specifically identified the proffered evidence of prior acts, but that brief has not been designated as part of the appellate record.

² See RCW 26.50.110; RCW 9A.46.020.

³ The unidentified incident appears to be one that occurred on July 12, 2004, as evidenced by the trial testimony.

Haile and asked if she remembered calling the police on July 12, 2004. Tesfatsion responded, "I have called the cops many times," and Haile objected. The court sustained the objection, struck the answer, and instructed the jury to disregard the evidence. The prosecutor then showed Tesfatsion the police report for July 12, 2004 incident and asked if it refreshed her recollection. She responded that she could not exactly recall what happened but that "lots of times I have called the cops." Haile again objected, and the court overruled the objection. Tesfatsion then continued to testify about the July 12 incident and said that Haile yelled at and harassed her outside her window.

Next, the prosecutor asked Tesfatsion about an incident on January 26, 2006, and she testified that she was coming out of her mother's house and Haile was waiting outside in his car. She said he first grabbed her, but she ran away and then he chased her in his car. She said that she thought he was going to run over her with the car and she called the police.

Tesfatsion also testified that on February 25, 2006, Haile came to her apartment and banged on her door. She said that when she finally opened the door, he came in and checked every room because he thought there was another man there. She testified that she was nice to him until he left because she was afraid of him but that once he left, she called police. The prosecutor then asked her if she remembered what happened the next day, January 26, and she responded: "I can't remember. This is -- this has been too long. It's been many, many times." Haile objected, and the court overruled the objection but told the prosecutor to ask her next question. The

prosecutor then asked her about the specific incident, and Tesfatsion testified that the Haile broke two outside lamps near her window.

After a break in Tesfatsion's testimony, Haile moved for a mistrial based on her repeated violations of the court's ruling on the motion in limine that only evidence of the four prior incidents was admissible. The court denied the motion, finding that the testimony that she called the police many times was "not so prejudicial as to support a mistrial."

The prosecutor then resumed examination of Tesfatsion and asked about the January 12, 2007 incident. She testified that Haile came to her workplace because she had his belongings in her car and she told him he had to take them. She said that when he arrived, he smelled like alcohol and she told him to leave. She further testified that he then tried to hug her, but she shoved him off and she eventually called the police because he would not leave.

Haile denied the allegations and presented evidence that he was elsewhere during the time he allegedly committed the charged violations. A witness also testified that Tesfatsion came to Haile's workplace on another occasion, grabbed his hair, and harassed him. The jury acquitted Haile on all counts except the one count of violation of a no-contact order that was based on the taped telephone call from the jail.

DISCUSSION

I. Motion for Mistrial

We review a trial court's ruling on a motion for a mistrial for an abuse of discretion.⁴ We will reverse a trial court's denial of a motion for mistrial only when there

is “a ‘substantial likelihood’ that the error prompting the request for a mistrial affected the jury’s verdict.”⁵ A mistrial should be granted “only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.”⁶ When reviewing a trial court’s denial of a motion for a mistrial based on a witness’s objectionable remarks, we consider the following factors: (1) the seriousness of the irregularity, (2) whether the error involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard these remarks.⁷ We must also examine the testimony in question “against the backdrop of all the evidence.”⁸

Haile contends that the trial court’s denial of his motion for a mistrial denied him a fair trial because Tesfatsion’s comments about inadmissible prior acts unfairly prejudiced the jury. The State contends that Tesfatsion’s reference to “‘many’” prior incidents was not so serious an irregularity to warrant a new trial because when viewed in the context of all the evidence, it was ambiguous and did not affect the verdict. We agree.

As the State points out, the jury already heard testimony about several other prior incidents as permitted by the court’s ER 404(b) ruling. While that evidence was limited to four incidents, there was no way for the jury to know that Tesfatsion’s reference to “‘many’” prior incidents meant there were more than the four admissible prior acts. Additionally, the trial court sustained Haile’s objections and instructed the

⁴ State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

⁵ State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002) (internal quotation marks omitted) (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

⁶ State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986).

⁷ State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

⁸ State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

jury to disregard the comments.⁹ Finally, given the jury's acquittal on all but the one count,

⁹ While Haile notes that the trial court "inexplicably" overruled two objections to this testimony, when viewed in context, the court's rulings did not endorse the testimony or unfairly prejudice the jury, as he suggests. Rather, the comments were equally ambiguous as the ones that received sustained objections. Additionally, after each overruled objection, the prosecutor immediately redirected Tesfatsion to limit her answer to the specific incident at issue. Thus, Haile fails to show that overruling these objections so prejudiced him that nothing short of a new trial could ensure him a fair trial.

Haile fails to show that there was a substantial likelihood that these comments affected the jury's verdict. The only count for which he was found guilty was proved by objective evidence of the taped telephone call from jail. The trial court properly exercised its discretion by denying the mistrial motion.

II. Statement of Additional Grounds

In a statement of additional grounds, Haile contests his conviction of the one count of violation of a no-contact order, asserting that he was falsely accused of the other charges and he would not have made the telephone call from the jail had he not been arrested. He further contends that if the police investigated the case and questioned his witnesses, they would have known that he was not at Tesfatsion's apartment. While not altogether clear, he appears to be arguing that because he was acquitted of the other charges and he had an alibi, there was no basis for his arrest and therefore evidence of the jail telephone call should not have been used to convict him. He provides no legal basis for this argument nor does he otherwise establish that his arrest was unlawful or that evidence of the telephone call was inadmissible. Thus, we find no merit to his claim.

Haile further contends that Tesfatsion was "acting out" in court and in front of the jury and prevented his attorney from asking her questions that needed to be asked. He also claims that before sentencing, the "D.A. invest[igator] went to the Judge and painted a bad picture" of him when the investigator should not have been speaking to the judge until the case was over. While the record indicates that Tesfatsion was unruly

in court, Haile fails to show that her conduct prejudiced him. Her testimony was only relevant to the counts on which he was acquitted; the only count for which he was convicted was based on the tape recording of the telephone call. Indeed, the acquittals on the other counts certainly suggest that her conduct in court weighed against her credibility and prejudiced the State's case rather than Haile. Finally, we are unable to review Haile's additional claim that a State investigator improperly spoke to the judge about his case without any support in the record for these allegations.

We affirm.

Ajid, J.

WE CONCUR:

Edenfor, J.

Cox, J.